IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMPHIS BIOFUELS LLC,	)	
	)	
Plaintiff,	)	Case No. 08-6145
	)	
v.	)	
	)	
CHICKASAW NATION INDUSTRIES, INC.	)	
	)	
Defendant.	)	

BRIEF OF APPELLANT

COMES NOW the Appellant, Memphis Biofuels, LLC ("MBF"), and respectfully submits this Brief of Appelant.

I. CORPORATE DISCLOSURE STATEMENT

MBF has no parent entity. No publicly-held corporation owns 10% or more of its stock.

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IV. JURISDICTIONAL STATEMENT

A. The basis for the District Court's subject matter jurisdiction.

This is the sole issue raised by the appeal, and will require extensive discussion. MBF respectfully refers this Honorable Court to MBF's argument hereinbelow.

B. The basis for the Court of Appeals' jurisdiction.

This is an appeal of a ruling made by the district court in a civil case arising from breach of contract, and is made pursuant to 28 U.S.C. § 1291 and Rule 3, Fed. R. App. P.

C. The filing dates establishing the timeliness of the appeal.

The Judgment was entered on August 21, 2008. The Notice of Appeal was filed on September 11, 2008. That Notice omitted to specify that the appeal was taken to the Sixth Circuit. Because the Sixth Circuit is the only court to which the appeal could have been taken, this constituted a harmless "informality of form". Fed. R. App. P. 3(c). See, e.g., Dillon v. United States, 184 F.3d 556, 557 (6th Cir. 1999). In order to specify the court to which the appeal was being taken, MBF filed an Amended Notice of Appeal on September 23, 2008.

D. Assertion that the appeal is from a final Order of judgment that disposes of all parties' claims.

The Judgment dismissed the case in its entirety, as to all issues, and so it was a final order of judgment which disposed of all parties' claims.

V. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether, in view of the complex and apparently unique situation in this case, the Honorable District Court erred in ruling that the Court lacked subject matter jurisdiction.

VI. STATEMENT OF THE CASE

This case arose from repudiation of a contract by CNI. Pursuant to that contract, the parties first mediated the case through the American Arbitration Association ("AAA") and, when that failed, MBF submitted the case to the AAA for arbitration as the contract required. CNI participated in the arbitration process at first, but stopped cooperating and filed suit in the Chickasaw Nation District Court on April 15, 2008, seeking a declaration that CNI possessed sovereign immunity and an injunction prohibiting the AAA and MBF from proceeding with the arbitration.

MBF filed this suit in the United States District Court for the Western District of Tennessee on April 24, 2008. MBF moved for an injunction prohibiting CNI from proceeding in the tribal court; the parties agreed to suspend proceedings in the tribal court pending resolution of this case. CNI filed a Motion to Dismiss pursuant to Rules 12(B)(1) and/or 12(B)(6) or, in the Alternative, to Stay for Failure to Exhaust Tribal Remedies ("the Motion").

Oral argument was heard on the Motion on June 10, 2008. MBF filed a Motion for Voluntary Dismissal without Prejudice as to the AAA on June 12, 2008. This was granted on June 30, 2008. On August 13, 2008, the Court entered an Order Granting CNI's Motion to Dismiss ("The Order"). On August 21, 2008, the Court entered a Judgment dismissing the case in its entirety for lack of subject matter jurisdiction.

VII. STATEMENT OF FACTS

MBF is a Delaware limited liability company, with its principal place of business located in Memphis, Tennessee. MBF is in the business of manufacturing biodiesel fuel. (Complaint, ¶ 7).

CNI is a federally-chartered corporation which is owned by the Chickasaw Nation Indian tribe ("the Nation"). CNI's charter ("the Charter") provides that CNI is a separate and distinct entity from the Chickasaw Nation: CNI "is a distinct legal entity pursuant to 25 U.S.C., Section 503 wholly owned [sic] by the Chickasaw Nation and its corporate activities, transactions, obligations, liabilities and

property are not those of the Chickasaw Nation". (Charter, P. 1.03) (emphasis added). It also provides that CNI has the following powers:

> 3.02. To sue in its corporate name and, notwithstanding the immunity possessed by the Corporation as a wholly owned corporation of the Chickasaw Nation, to permit by written resolution of the board of directors enforcement of leases, contracts, agreements and mortgage instruments to which the corporation is a party, against the corporation in tribal court, or any court of competent jurisdiction by agreement of the board of directors; provided, however, that this limited waiver of sovereign immunity does not authorize the levy of any judgment, lien, garnishment or attachment upon any property or income of the Corporation specifically and in writing duly mortgaged, pledged or assigned as collateral for the debts or liabilities of the authority provided herein is not intended to nor shall it be construed to waive the immunity of the Corporation, the Chickasaw Nation, or any agency thereof, for any other purpose with respect to any claim or other matter not specifically mentioned herein, and is not intended to, nor shall it extend to the benefit of, any person other than the parties to such leases, contracts, agreements or mortgage instruments or their successors or assigns.

CNI has its own Board of Directors. (Charter, P. 3.02). It has its own officers, who are distinct from the Nation's officials. (www.chickasaw.com, May 23, 2008). According to its website, CNI is a diversified corporation engaged in numerous business enterprises, which has over 2,000 employees spread over "twelve different companies that provide a variety of products and services." (www.chickasaw.com, May 23, 2008).

CNI wanted to get into the biodiesel business in 2006, and so it retained an entity called United States Alternative Fuels, LLC, a consulting firm, to assist it in that endeavor. (Complaint, ¶ 9). The particular consultant who was to assist CNI was a Mr. John Stocker. (Complaint, ¶ 10). Mr. Stocker, representing CNI, contacted MBF in Memphis, Tennessee, to negotiate a deal between CNI and MBF. (Complaint, ¶¶ 10-12). The understanding was that CNI would obtain soybean oil and would deliver it to MBF's facility in Memphis, Tennessee, for MBF to by mix with diesel fuel and, subjecting it to certain chemical processes, to create biodiesel fuel for CNI to sell in the biodiesel market. This conversion process is known in the biodiesel business as "tolling".

CNI, acting through Mr. Stocker, and MBF began to negotiate a tolling agreement, leading to the creation of the contract at issue, the Internal Authorization & Contract for Conversion of Product by Memphis Biofuels, (hereinafter "the Agreement"). During the negotiations, one of CNI's in-house lawyers noted as a hand-written comment on a draft of the Agreement sent to CNI's agent Mr. Stocker that any waiver of sovereign immunity would need to be approved by CNI's Board of Directors. This was sent to MBF by CNI's agent, Mr. Stocker, who stated in a cover email that "the major issue is as a federally-chartered corporation, they will not submit disputes to a state court. Other than that, it looks like we are on the same wavelength." Thus, MBF was aware that in the event of a dispute, CNI might attempt to claim the protection of the tribe's sovereign immunity and so, desiring to avoid just such an argument as CNI now makes, MBF insisted that in the Agreement, the parties have a clause which unequivocally waived any possibility of sovereign immunity, and further that CNI "represent and warrant" that the waiver of sovereign immunity was "valid, enforceable and effective". CNI agreed to this. MBF's understanding was that this representation and warranty, made by Mr. Deryl Wright, CNI's President and Chief Executive Officer, when he signed the Agreement, was blanket assurance that all internal approval requirements for CNI to enter into a valid, binding contract had been fulfilled. Declaration of Ken Arnold). MBF believed that CNI's President and CEO had the authority to promise this, as is reasonable and customary for corporations, and saw no reason, as CNI argues, to presume that CNI's President and CEO would lie about this such that MBF should have required him to produce a resolution of CNI's Board to prove that he was not lying. (Declaration of Ken Arnold).

Thus, the Agreement as ultimately executed by the parties contained, among other terms and conditions, a waiver of sovereign immunity; a requirement that any disputes be mediated and then arbitrated by the AAA; and a "representation and warranty" that the waiver of sovereign immunity was "valid, enforceable and effective". It provided for jurisdiction in Tennessee's federal courts and Oklahoma's state courts. The Agreement also provided for Tennessee law, other than choice of law principles, to be applied. The Agreement was signed by Mr. Deryl Wright, the President and CEO of CNI, and by MBF.

The dispute resolution clause is important enough to quote more fully:

> If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules before resorting to arbitration, it being understood that mediation shall be conclusively deemed to have failed if it does not result in settlement within four months after having been commenced. Any controversy or claim arising out of or relating to this contract including those relating to its formation or performance or breach shall be resolved by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules including the Emergency Interim Relief Procedures, and judgment on the award rendered by the arbitrator(s) may be entered as hereinafter set forth. [CNI] AND [MBF] HEREBY EACH IRREVOCABLY AGREE TO THE FULL APPLICABILITY OF THE FEDERAL ARBITRATION ACT OF 1947, AS AMENDED. EACH ALSO CONSENTS TO THE PLENARY JURISDICTION OF ANY UNITED STATES FEDERAL COURT SITTING IN TENNESSEE AND THAT OF ANY STATE COURT IN OKLAHOMA REGARDING ANY MATTER SUBMITTED TO MEDIATION OR RESOLVED BY MEDIATION OR SUBMITTED TO ARBITRATION OR RESOLVED BY ARBITRATION (INCLUDING WITHOUT LIMITATION APPLICATIONS TO COMPEL ARBITRATION, THE CONDUCT OF ANY ARBITRATION AND THE ENTRY OF JUDGMENTS ON ARBITRATION AWARDS AND ORDERS CONFIRMING SUCH AWARDS) AND OTHER LITIGATION OR OTHER PROCEEDINGS, IF ANY, BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH THIS AGREEMENT, WHICH HAVE BEEN FOUND TO BE OUTSIDE THE SCOPE OF THE ABOVE MEDIATION AND ARBITRATION PROVISIONS. EACH PARTY HEREBY IRREVOCABLY CONSENTS TO THE SERVICE OF PROCESS BY REGISTERED MAIL, POSTAGE PREPAID, OR BY PERSONAL SERVICE WITHIN OR WITHOUT THE STATE OF TENNESSEE AT ITS THEN-CURRENT PRINCIPAL PLACE OF BUSINESS. EACH PARTY HEREBY EXPRESSLY AND IRREVOCABLY WAIVES ANY OBJECTION THAT IT MAY HAVE OR HEREAFTER MAY HAVE TO THE LAYING OF VENUE OF ANY SUCH PROCEEDINGS BROUGHT IN ANY SUCH COURT REFERRED TO ABOVE AND ANY CLAIM THAT ANY SUCH LITIGATION HAS BEEN BROUGHT IN AN INCONVENIENT FORUM. TO THE EXTENT THAT [CNI] OR [MBF] HAS OR HEREAFTER MAY ACQUIRE ANY IMMUNITY FROM SUIT IN OR JURISDICTION OF ANY COURT NAMED ABOVE OR FROM ANY LEGAL PROCESS FROM OR RELATING TO ANY SUCH COURT WHETHER BY REASON OF LAW APPLICABLE TO AMERICAN INDIANS, THROUGH SERVICE OR NOTICE, ATTACHMENT PRIOR TO JUDGMENT, ATTACHMENT IN AID OF EXECUTION OR OTHERWISE) WITH RESPECT TO ITSELF OR ITS PROPERTY, SUCH PARTY HEREBY IRREVOCABLY WAIVES SUCH IMMUNITY. EACH PARTY REPRESENTS AND WARRANTS THAT SUCH WAIVER BY IT IS VALID, ENFORCEABLE AND EFFECTIVE. EACH PARTY WAIVES ANY RIGHT THAT IT MAY HAVE TO CLAIM OR RECOVER IN ANY ARBITRATION LEGAL ACTION OR PROCEEDING REFERRED TO IN THIS SECTION ANY OF ITS SPECIAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES.
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> (Capitalization in original) (emphasis added).

CNI subsequently sent a letter repudiating the Agreement. Pursuant to the Agreement, MBF initiated a mediation proceeding with the American Arbitration Association ("AAA"). The mediation and subsequent negotiations were unsuccessful, so MBF duly instituted an arbitration proceeding with the AAA, pursuant to the Agreement

The AAA opened a file and contacted counsel for MBF and counsel for CNI to conduct a scheduling conference for the arbitration. However, CNI's counsel

cancelled the scheduling conference call, and did not give dates to reschedule it. Instead, on April 15, 2008, CNI filed suit against MBF and the AAA in the Chickasaw Nation District Court in Ada, Oklahoma, seeking to enjoin MBF and the AAA from proceeding with the arbitration, and seeking a declaration that the contract was void because although Mr. Wright, CNI's President and CEO, had executed it, and it contained a "representation and warranty" that the waiver clause was "valid, enforceable and effective", because CNI's Board had not formally adopted a written resolution[1] approving the waiver and that, hence, the waiver of sovereign immunity in the Agreement was invalid. This was the first time that CNI had ever raised sovereign immunity as an issue.

MBF instigated this case on April 24, 2008. The parties agreed to suspend activities in the case in the tribal court pending the outcome of this case.

VIII. SUMMARY OF ARGUMENT

MBF submits that federal subject matter jurisdiction exists under federal question jurisdiction and diversity jurisdiction. Federal question jurisdiction exists on two separate bases: First, because federal statutory law is determinative of the issue of sovereign immunity, an issue upon which the District Court based its ruling that it lacks jurisdiction; second, there is an issue of the jurisdiction of the Chickasaw Nation District Court, a tribal court, over MBF, and that is a federal question. The District Court ruled that while this issue would be a basis for federal question jurisdiction, MBF had not adequately raised it. MBF respectfully submits that this was reversible error.[2]

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[1] CNI does not allege that its Board was uninformed about the transaction and contract with MBF or that management was acting in a rogue manner. CNI alleges only that no formal resolution of its Board was adopted. An interesting, unresolved question in this case is the degree to which CNI management informed its Board, perhaps fully, about the Agreement and may (or may not) have received "winks and nods" to go ahead, with the step of adopting a formal resolution deliberately avoided (although achieved in substance) to create a technical defense to performance on the Agreement. MBF has not yet sought discovery; but at some point in whatever proceeding eventuates between MBF and CNI, were it to be determined that CNI's technical "no resolution" defense has not been waived, discovery can reveal exactly what the CNI Board's involvement in this contract really was. MBF also would want discovery as to whether CNI ever entered into other contracts which supposedly its Board should have approved and if so, whether a separate resolution was executed.

[2] MBF also argued to the District Court that the "internal affairs" doctrine created federal question jurisdiction in that

Diversity jurisdiction exists because MBF and CNI are "citizens" of different states and the amount in controversy exceeds $75,000. The District Court ruled that there is no diversity jurisdiction because the Court held that CNI enjoys the Nation's sovereign immunity. MBF respectfully submits that CNI has no immunity.

IX. ARGUMENT

A. The standard of review. A district court's decision to dismiss for lack of subject matter jurisdiction is subject to a de novo standard of review for legal conclusions and a "clearly erroneous" standard of review for the factual determinations underpinning the legal conclusions. Loren v. Blue Cross & Blue Shield of Michigan, 505 F.3d 598, 604 (6th Cir. 2007); Waxman v. Luna, 881 F.2d 237, 240 (6th Cir. 1989). Here, because CNI attacked the factual basis for jurisdiction, the district court was not required to take the allegations in the complaint as true. United States v. Ritchie, 15 F.2d 592, 598 (6th Cir. 1994). Instead, the court was free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. Id. Upon review, the appellate court should uphold factual findings unless clearly erroneous and review de novo findings of ultimate fact which resulted from the application of legal principles to subsidiary factual determinations. Waxman, 881 F.2d at 240. (In this case, the facts are essentially undisputed). Conclusions of law are subject to de novo review. Id.

B. There is Federal Question Jurisdiction.

1. The sovereign immunity issue is a basis for federal question jurisdiction. The issue on this appeal is whether there is subject matter jurisdiction. However, a sub-issue, whether CNI enjoys sovereign immunity, was turned into "the tail that wags the dog" and became the determinative sub-issue on the larger issue of whether there is diversity jurisdiction. (See Order, Dkt. 21, at 31). The District Court went so far as to make a ruling that CNI enjoys sovereign immunity. (See Order, Dkt. 21, at 11).

CNI is a federally-chartered corporation, but MBF has abandoned that argument for the purposes of this appeal.

CNI alleges that, although it is a corporation, and not a "sovereign", it enjoys sovereign immunity, based on the federal statute, the Indian Reorganization Act ("IRA") 25 U.S.C. § 461, et. sq., pursuant to which it was created, and the District Court so ruled. Subject matter jurisdiction therefore exists because resolution of this now-essential question will be governed by a federal statute, making this a federal question because "some substantial, disputed question of federal law is a necessary element . . . of the well-pleaded state claim[]," and because the "claim is 'really' one of federal law," federal question jurisdiction exists. City of Warren v. City of Detroit, 495 F.3d 282, 286 (6th Cir. 2007). Although MBF did not explicitly note this basis for jurisdiction in its Complaint, it was alluded to in CNI's Complaint in the tribal court, which was attached to MBF's Complaint and incorporated therein by reference. (Verified Complaint for Declaratory and Injunctive Relief, Dkt. 1-5, at ¶ 3-4).

The Court is permitted to "look past the words of a complaint to determine whether the allegations, no matter how the plaintiff casts them, ultimately involve a federal question." Ohio ex rel. Skaggs v. Brunner, 549 F.3d 468, 474-475 (6th Cir. 2008). MBF did not expect interpretation of the IRA to turn into a basis for federal question jurisdiction, but it did so; because there was raised "a stated federal issue, actually disputed and substantial," the question of whether CNI's incorporation under the IRA automatically conferred sovereign immunity upon it, and thereby eliminated diversity jurisdiction, is therefore itself a basis for federal jurisdiction. Grable & Sons Metal Prods., Inc., v. Darue Engineering & Mfg., 545 U.S. 308, 314 125 S. Ct. 2363, 2368, 162 L. Ed. 2d 257, 265 (2005). On this basis alone, the judgment of the Honorable District Judge should be reversed and the case should be reinstated.

2. The Question of Tribal Court Jurisdiction Over MBF is Another Basis for Federal Question Jurisdiction.

Additionally, the mere existence of the issue of whether the tribal court has jurisdiction over MBF, a non-Indian entity, creates federal question jurisdiction. Plains Commerce Bank v. Long Family Land and Cattle Co., Inc., 554 U.S. _, 128 S. Ct. 2708, 2716, 171 L. Ed. 2d 457 (2008), National Farmers Union

Ins. Co. v. Crow Tribe, 471 U.S. 845, 852-53 105 S. Ct. 2497, 85 L. Ed. 2d 818 (1985). Even CNI conceded this point. (Order, Dkt. 21, at p. 28).

The District Court held that "[a]lthough the court would have jurisdiction to consider a challenge to the Chickasaw Nation District Court's personal jurisdiction over MBF, Plaintiff has made no such challenge." (Order, Dkt. 21, at 28-29)[3] MBF respectfully submits that the question was adequately raised. MBF's Complaint, styled as a "Verified Complaint for Declaratory Judgment…" (emphasis added) alleged, in pertinent part:

> **D. The Tribal Court in Oklahoma Lacks Personal Jurisdiction Over MBF.**
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> 31. MBF alleges in addition and in the alternative that MBF has not maintained sufficient minimum contacts with the State of Oklahoma or the Chickasaw Nation for the Chickasaw Nation District Court to exercise personal jurisdiction as to MBF. The initial contact that led to the creation of the Tolling Agreement was made by CNI; MBF has never sent anyone to Oklahoma with regard to this matter; and MBF's e-mails and telephone calls to CNI in Oklahoma are not enough to justify the Chickasaw Nation District Court's exercise of personal jurisdiction over MBF.
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> **C. Injunctive Relief.**
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> 34. MBF alleges that it is entitled to a temporary restraining order and preliminary and permanent injunctive relief restraining and enjoining CNI from proceeding with its action in the Chickasaw Nation District Court, something which it expressly contracted away the right to do, and ordering CNI to proceed with the arbitration as it agreed to do. MBF alleges that it will incur immediate and irreparable harm in the absence of such relief in that (a) the Chickasaw Tribal Court could enjoin the AAA from conducting the arbitration even if this court determines that the Tribal Court has no jurisdiction over plaintiff and (b) plaintiff will be forced to litigate in the Tribal Court in Oklahoma, an inconvenient forum, and not in the AAA, a forum to which CNI expressly agreed, and there is no contention that the arbitration clause required the approval of CNI's Board of Directors. MBF is entitled to the benefit of its bargain, including but not limited to the arbitration clause, which will not be achieved unless this Honorable Court issues the requested Temporary Restraining Order. MBF alleges that in view of CNI's statement that it intends to seek a Temporary Restraining Order, and may do so as early as April 24, 2008, that immediate and irreparable harm will exist if this Court does not issue the requested Temporary Restraining Order on an expedited basis, without waiting the five (5) days after notice specified by 9 U.S.C. § 4.

[3] The Court held also that it likely would have "stayed its hand" under the tribal exhaustion doctrine. (Order, Dkt. 21, at 31). The Court did not make a final ruling on this, so MBF will not discuss it herein.

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> **VI. PRAYER FOR RELIEF**
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> …
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> 5. This Honorable Court award Plaintiff all such other and further relief as the Court may deem proper in the premises.
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> (Verified Complaint, Dkt. 1, at ¶¶ 31, 37, VI. 5).
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> …

Thus, MBF alleged that the tribal court lacked jurisdiction over it, and pleaded for an injunction to prohibit CNI from proceeding in the tribal court. It necessarily follows that the request for injunction was based on the allegation that the tribal court lacked jurisdiction as set forth in paragraph 31 of the Complaint. Otherwise, there would have been no point to the allegation that the tribal court lacked jurisdiction; in other words, a declaration that there is no jurisdiction is a necessary part of a determination to enjoin the other court from proceeding for lack of jurisdiction. The Court focused on whether MBF requested the proper remedy, i.e. whether MBF explicitly asked for a declaration that the tribal court lacked personal jurisdiction over MBF. The Court acknowledged that the Complaint was more than adequate to put CNI on notice that MBF was contesting the tribal court's personal jurisdiction; even CNI did not dispute this. (Order, Dkt. 21, at 29, n. 16). The Court ruled as it did because there was no specific request for declaratory relief on the issue, (Order, Dkt. 21, at 29.) and also reasoned that the "claim" that the tribal court lacks personal jurisdiction over CNI "is not tied to the request for a temporary restraining order or any other prayer for relief." (Order, Dkt. 21, at 29 n.16). This is incorrect. MBF expressly tied the lack of jurisdiction with its request for injunctive relief. (Verified Complaint, Dkt. 1, at ¶ 34(a)). The question, then, is whether the lack of a request for declaratory relief specifically on this issue is fatal to the claim.

To require that MBF also request specifically a declaration that the tribal court had no jurisdiction is beyond what the law requires. The issue of whether the proper remedy has been prayed for in the complaint is inconsequential on a Rule 12(b)(6) motion. Bontkowski v. Smith, 305 F.3d 757, 762 (7th Cir. 2002). This Court has held that dismissal is improper when the claims made in the complaint

could support a declaratory judgment, even when the complaint fails to request a declaratory judgment in the prayer for relief. Dann v. Studebaker-Packard Corp., 288 F.2d 201, 216–17 (6th Cir. 1961), disapproved of on other grounds by J. I. Case Co. v. Borak, 377 U.S. 426, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964). *See also* Burkina Wear, Inc. v. Campagnolo, S.R.L., Dkt. No. 07 Civ. 3610., 2008 WL 1007634 at *3 (S.D.N.Y. April 09, 2008) ("The sufficiency of a pleading is tested by the Rule 8(a)(2) statement of the claim for relief and the demand for judgment is not considered part of the claim for that purpose. Thus, the selection of an improper remedy in the Rule 8(a)(3) demand for relief will not be fatal to a party's pleading if the statement of the claim indicates the pleader may be entitled to relief of some other type") (quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1255 (3d ed. 2004)); Avco Corp. v. Aero Lodge No. 735 Int'l Assoc. of Machinists and Aerospace Workers, 263 F. Supp. 177, 180 (M.D. Tenn. 1966) (prayer for declaratory relief is sufficient to raise a claim for all appropriate relief).

As a general rule, pursuant to Rule 8, the failure to plead a specific form of relief does not preclude the party from obtaining that relief. Rule 8(a)(3) requires that all pleadings must contain "a demand for the relief sought, which may include relief in the alternative or different kinds of relief." Although some specific form of relief must be requested, the rule does not require that each form of relief sought be stated explicitly, nor does it require even that the relief that is requested be proper under the circumstances. See Sheet Metal Workers Local 19 v. Keystone Heating and Air Conditioning, 934 F.2d 35, 40 (3d Cir. 1991); Laird v. Integrated Res., Inc., 897 F.2d 826, 843 (5th Cir. 1990). As such, Rule 8(a)(3) is inapplicable to Rule 12(b)(1) and 12(b)(6) motions. Bontkowski, 305 F.3d at 762.

This is because Rule 8(c)(3) must be read in light of Fed. R. Civ. P. 54(c). See Z Channel Ltd. Partnership v. Home Box Office, Inc., 931 F.2d 1338, 1341 (9th Cir. 1991). Under Fed. R. Civ. P. 54(c), "every… final judgment [other than a default judgment] should grant the relief to which each party is entitled, *even if the party has not demanded that relief in its pleadings*." (Emphasis added). Courts consistently have interpreted this section as permitting the recovery of

any relief that appears to be proper under the allegations of the Complaint, regardless of whether it was specifically requested. E.g., Z Channel, 931 F.2d at 1341. The only exception is where there will be prejudice to the opposing party. Stewart v. Furton, 774 F.2d 706, 710 (6th Cir. 1985).

Further, declaratory judgment actions, like most other actions in federal court, need only satisfy the notice pleading standard. GNB Battery Techs., Inc. v. Gould, Inc., 65 F.3d 615, 620 (7th Cir. 1995) (citing 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1238 (1990)). In order to survive either a 12(b)(1) or a 12(b)(6) motion, the complaint must set forth only a short and plain statement of the claim in order to give the opposing party notice of the claims that are being asserted. Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007).

The Declaratory Judgment Act is procedural in nature, defining only an available remedy. Bell & Beckwith v. United States, 766 F.2d 910, 913 (6th Cir. 1985). Although declaratory judgment complaints "should clearly state the relief sought, . . . the plaintiff's pleading need not, in specific language, seek a declaratory judgment where it is apparent from the facts alleged that that is the relief to which he or she is entitled." 26 C.J.S. Declaratory Judgments § 136. As stated by this Court:

> [I]t would seem, at the very least, that these appellants have stated a claim for a judgment declaring either the validity or the invalidity of said proxies, pursuant to the Declaratory Judgment Act, 28 U.S.C. 2201, 2202. Nor will the fact that they have not, in express terms, demanded declaratory relief make any difference in this regard. It has long been established law that, in equity, a plaintiff is entitled to any relief appropriate to the facts alleged in the bill and supported by the evidence, even where he has not prayed for such relief. . . . Accordingly, we have no difficulty in holding that these appellants may be entitled to declaratory relief under the facts alleged in their complaint. Therefore, the motion to dismiss for failure to state a claim upon which relief can be granted should be overruled at this stage of the proceedings.

Dann, 288 F.2d at 216-17.

CNI cannot claim prejudice because it was aware that MBF sought a declaratory judgment. The parties briefed the jurisdiction issue extensively, and there have been no other proceedings. MBF clearly and concisely stated a claim that the tribal court lacked jurisdiction over MBF, a point that CNI concedes. Complaint, Dkt. 1 at ¶31; CNI's Reply Memorandum, Dkt. 9 at 2; Order, Dkt. 20 at 29 n.16. MBF also alluded to declaratory relief in its request for injunctive relief. *Complaint, supra*, at ¶34 ("the Chickasaw Tribal Court could enjoin the [American Arbitration Association] from conducting the arbitration *even if this court determines that the Tribal Court has no jurisdiction over [MBF]* . . . ." (emphasis added)). In addition, "a prayer for an injunction constructively acts as a prayer for all appropriate relief." Avco Corp. v. Aero Lodge No. 735 Int'l Assoc. of Machinists and Aerospace Workers, 263 F. Supp. 177, 180 (M.D. Tenn. 1966). Further, the prayer for relief included a "catch-all" request. Given the liberal construction afforded to pleadings and these clear statements in MBF's Complaint, CNI was given more than sufficient notice of the potential for declaratory relief on this issue, meaning that there is federal question jurisdiction on this basis.

a. A Declaratory Judgment is Warranted.

Moving beyond the pleading issue, MBF acknowledges that whether to entertain a declaratory judgment action is within the district court's discretion and is reviewed on appeal for abuse of that discretion. Foundation for Interior Design Educ. Research v. Savannah Coll. of Art & Design, 244 F.3d 521, 526 (6th Cir. 2001); Scottsdale Ins. Co. v. Roumph, 211 F.3d 964, 967 (6th Cir. 2000). Further, the Court of Appeals may consider the issue de novo and issue such a ruling itself, or may remand the case for consideration by the district court. Roumph, 211 F.3d at 967. In view of the possibility that this Court could grant the requested relief sua sponte, MBF will address the standard for doing so.

Five factors are relevant in determining whether to entertain a declaratory judgment action. Scottsdale Ins. Co. v. Flowers, 513 F.3d 546, 554 (6th Cir. 2008); Roumph, 211 F.3d at 968. MBF will discuss each in turn:

1) Whether the judgment would settle the controversy.

A declaration that the tribal court lacks personal jurisdiction over MBF and an injunction prohibiting CNI from proceeding in that Court would end the dispute between the parties to the extent that it would eliminate the possibility of overlapping proceedings in different courts. This factor favors MBF.

2) Whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue.

"The requirement that the judgment clarify the legal relationships of the parties is based upon our desire for the declaratory judgment to provide a final resolution of the discrete dispute presented." Flowers, 513 F.3d at 557. Here, a declaration that the tribal court either has or lacks personal jurisdiction over MBF will finally determine the discrete dispute as to whether CNI can pursue its action in the tribal court. This prong also favors MBF.

3) Whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata".

The Sixth Circuit has stated that this prong is meant to deter "forum shopping" by a party who is not the "natural plaintiff." Flowers, 513 F.3d at 558. MBF did not invoke the Court's jurisdiction for any improper purpose. Indeed, at its core, CNI's tribal court action is a declaratory judgment action. MBF is the "natural plaintiff" in this case, as it would have a cause of action for breach of contract independent of the declaratory judgment action. Id.

CNI is using the tribal court action in an attempt to usurp the right of the "natural plaintiff", MBF, to choose the forum in which to litigate the breach of contract case. Thus, CNI has engaged in "procedural fencing" by invoking tribal court jurisdiction for the sole purpose of acquiring a favorable forum, and so this element is in MBF's favor.

4) Whether the use of a declaratory action would increase the friction between federal and tribal courts and improperly encroach on the Nation's jurisdiction.

Three "sub-factors" are required by Flowers in evaluating this factor:

a) Whether the underlying factual issues (in the parallel proceeding) are important to an informed resolution of the case.

The identical facts are before both courts, so this factor is a wash.

b) Whether the other court is in a better position to evaluate those factual issues than is the federal court.

The tribal court is in no better position than the District Court for this.

c) Whether there is a close nexus between the underlying factual and legal issues and Indian law and/or public policy, or whether federal common or statutory law dictates a resolution of the declaratory judgment action.

MBF concedes that this question affects Indian law and policy, but only peripherally—CNI is a large, diversified, sophisticated for-profit corporation—and not an Indian tribe.

5) Whether there is an alternative remedy that is better or more effective.

There is no alternative that would be better than a ruling from a federal court.

b. Conclusion. In conclusion on this point, MBF respectfully submits that the Court was incorrect in ruling that MBF had not adequately raised the tribal court's jurisdiction, and went far beyond anything required by Rule 8 and the cases setting forth the standards for pleadings, particularly with regard to declaratory judgment actions. There is indeed federal question jurisdiction on this basis, and so this too is a proper ground for reversal of the judgment of the District Court. Finally, if this Court is inclined to address the issue sua sponte, a declaratory judgment should be issued.

C. There is Diversity Jurisdiction. MBF contends that there is also diversity jurisdiction. The District Court disagreed, ruling that because CNI was chartered pursuant to Section 17 of the IRA, it was endowed at its creation with tribal immunity. The Court went on to hold that this automatic immunity could have been waived in the Charter or by way of the Agreement, but that neither was effective to do so. The Court held that CNI is therefore not a citizen of any state, and so there was no diversity jurisdiction. (Order, Dkt. 21, at 31).

MBF respectfully submits that this approach is incorrect. Under Sixth Circuit law, subject matter jurisdiction and sovereign immunity are separate jurisdictional considerations. See Nair v. Oakland County Community Mental Health Authority, 443 F.3d 469, 476 (6th Cir. 2006). See also In re Prairie Island Dakota Sioux, 21 F.3d 302, 304 (8th Cir. 1994). But see Miner Elec., Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007 (10th Cir. 2007). The diversity statute, 28 U.S.C. § 1332, does not exclude a federally-chartered corporation from being a citizen of the state in which it maintains its principal place of business. Classifying a federally-chartered corporation such as CNI as a citizen of a state only if it waives immunity, as the Court did, would impermissibly allow the corporation to waive into diversity jurisdiction. Further, if the district court believed there was no subject matter jurisdiction because there was no federal question or complete diversity between the parties, it should not have ruled on CNI's immunity so that MBF could make its claim in another court.

1. Setting aside the immunity question, CNI would be a "citizen" of Oklahoma and diversity would exist.

For jurisdictional purposes, a corporation is considered a citizen of the state by which it was incorporated as well as the state in which it maintains its principal place of business. 28 U.S.C. 1332(c)(1). The statute does not distinguish between types of corporations, nor is it limited to corporations that are organized under the laws of a state. Thus, as a federally-chartered corporation that maintains its principal place of business in Oklahoma, CNI is a citizen of Oklahoma. American Vantage Cos., Inc. v. Table Mountain Rancheria, 292 F.3d 1091, 1095 n.1 (9th Cir. 2002); Gaines v. Ski Apache, 8 F.3d 726, 729 (10th Cir. 1993). This is a totally separate issue from the question of whether CNI enjoys sovereign immunity. MBF is a citizen of both Delaware and Tennessee. Thus, setting aside for the moment the immunity issue, complete diversity exists.

The District Court found CNI non-diverse because it determined that CNI received immunity at the moment of its creation and had not waived it, and so is not a citizen of any state and there can be no diversity jurisdiction. (Order p. 17). The Court's rationale was that Section 17 provides for this. To reach

this conclusion, the Court cited three cases, two law students' comments, and an article in a bar magazine, and distinguished some cases cited by MBF. (Order, Dkt. 21 at 14-17). MBF respectfully submits that this finding was in error; a careful analysis reveals that there is no such automatic immunity. Nothing in the statute creates immunity for Section 17 corporations, nor does anything in the legislative history (assuming that it would be proper to review the history). The cases cited by the court as supporting automatic immunity all lead back to dicta in an opinion which was later disavowed by the court which issued it. The better approach is the "real party in interest" or "arm of the tribe" test, pursuant to which the ineluctable conclusion is that CNI had no immunity to waive.

2. Nothing in the plain language of the OIWA or the IRA entitles CNI to immunity.

CNI is a federal corporation which was organized under the Oklahoma Indian Welfare Act, 25 U.S.C. 503, which extends the right to incorporate found in Section 17 of the IRA, 25 U.S.C. § 477 to tribes in Oklahoma. The IRA was enacted in 1934.

Sections 16 and 17 of the IRA, 25 U.S.C. § 476 and 477, respectively, allowed certain Indian tribes, but not including the Nation and some others, to incorporate with two types of entities, one for government purposes and the other for business functions.

25 U.S.C. § 477, Section 17 of the IRA, provides for "incorporated tribes":

> The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

25 U.S.C. § 477.

Congress decided in 1936 to extend the provisions of the IRA to the Nation and some other tribes, and so it enacted the Oklahoma Indiana Welfare Act ("OIWA"). It provides in relevant part:

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting.… Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under [The Indian Reorganization Act].[4]

25 U.S.C. § 503

CNI was incorporated pursuant to Section 17 of the IRA, as made possible by the OIWA.[5]

As the above quotations evidence, both the OIWA and the IRA are completely silent on immunity as to business corporations owned by a tribe, thus, CNI cannot be presumed to possess the Tribe's sovereign immunity based upon anything in the OIWA or IRA.

3. Nothing in the legislative history of the OIWA or the IRA supports reading immunity into either law to allow CNI to benefit from the tribe's immunity.

The absence of reference to immunity in the statutes should preclude any need for examination of the legislative history. Koenig Sporting Goods, Inc. v. Morse Rd. Co. (In re Koenig Sporting Goods), 203 F.3d 986, 988 (6th Cir. 2000). United

[4] The references to sections 476 and 477 refer to 25 U.S.C. § 467 and § 477, which are sections 16 and 17, respectively, of the Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act.

[5] There is some confusion in the record as to which statute applies, and the effect of the choice of statute upon CNI's claim to immunity. (Order, at pp. 10-11). At one point, CNI conceded that Section 17 corporations are not immune, which would mean that CNI is a citizen of Oklahoma and subject to diversity jurisdiction. (Order, p. 11, n. 8). CNI changed its position to argue that it incorporated under Section 17 of the IRA and that this means it is immune, and the Court so held.

States v. Mills, 140 F.3d 630, 633 (6th Cir. 1998). Nonetheless, the district court cited some authorities suggesting that the legislative history supports a finding that Section 17 corporations have immunity. Therefore, MBF has examined the legislative history of the OIWA and the IRA and has found no indication that Congress intended for the tribe's immunity to extend to a separate corporate entity chartered under either statute.

There is no reference to immunity of corporations in the Senate version of the bill, which became the IRA, the House version of the bill, nor the Conference Committee Report, and the Conference Committee adopted the Senate's version of the bill. When the Conference Committee Report was presented to the House and Senate there were no discussions about the immunity of a tribal corporation. Elmer R. Rusco, A Fateful Time (Univ. Of Nevada Press 2000)., Thus, even if there were a need to resort to the legislative history, there is nothing in the legislative history that supports extending immunity to a corporation such as CNI, with a distinct, separate existence apart from the tribe[6].

[6] MBF reviewed all sources which it could obtain for references to sovereign immunity in the legislative history of the IRA and OIWA, including the relevant sections of the Congressional Record and Congressional Reports surrounding the enactment of the IRA along with other sources that describe legislative history. These materials include: Marceau v. Blackfeet Housing Authority, 455 F.3d 974 (9th Cir. 2006); Muscogee (Creek Nation v. Hodel), 851 F.2d 1439, 1442 (D.C. Cir. 1988); Morris v. Watt, 640 F.2d 404, 409 n.11 (D.C. Cir. 1981); State ex. rel. Oklahoma Tax Comm'n, 1992 OK 127 (1992); Ogden v. Iowa Tribe of Kan. & Neb., 250 S.W.3d 822, 825-827 (Mo. Ct. App. 2008); Letter from President Franklin D. Roosevelt to Representative Howard (April 28, 1934), 73 Cong. Rec. 7807 (1934); Letter from President Franklin D. Roosevelt to Senator Burton Wheeler (April 18, 1934), in S. Rep. No. 73-1080, at 3-4 (1934); To Promote the General Welfare of the Indians Of the State Of Oklahoma, and For Other Purposes, H.R. Rep. No. 74-2408, (1934) (report to accompany S. 2047); Readjustment of Indian Affairs, H.R. Rep. No. 73-1804, 3-4 (1934); Authorizing Indians to Form Business Councils, Corporations, and for Other Purposes, S. Rep. No. 73-1080, (1934) (report submitted from the Committee on Indian Affairs to accompany S. 3645); 73 Cong. Rec. 12218 (1934) (statement of Mr. Mead) ; 73 Cong. Rec. 12164 (1934) (statement of Rep. Edgar Howard) (reading S. Rep. No. 73-2049, (1934) (Conf. Rep.)); 73 Cong. Rec. 12161-12164 (1934); 73 Cong. Rec. 11724-11744 (1934) (statement of Mr. Howard); 73 Cong. Rec. 9786 (1934) (statement of Mr. Howard); 73 Cong. Rec. 9265-9271 (1934) (statement of Mr. Hastings); 73 Cong Rec. 7182 (1934) (statement of Mr. Cartwright opposing the IRA); 73 Cong. Rec. 2440 (1934) (statement of Mr. Wheeler introducing S. 2755); 73 Cong. Rec. 2435 (1934) (statement of Mr. Howard introducing H.R. 7902); William C. Canby, Jr., American Indian Law in a Nutshell (West Group 3d ed. 1998); Elmer R. Rusco, A Fateful Time: The Background and Legislative History of the Indian Reorganization Act (University of Nevada Press 2000); Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of the Alaska Native Claims Settlement Act*, 25 Alaska L. Rev. 107 (2008); Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judicial Analysis*, 50 U. Kan. L. Rev. 473 (2002); Charlotte M. Emery, *Tribal Government in North America: The Evolution of Tradition*, 32 Urb. Law. 315 (2002); D. Jay Hannah, *The 1999 Constitution Convention o f the Cherokee Nation*, 35 Ariz. St. L. J. 1 (2005); Kirke Kickingbird, *"Way down Yonder in the Indian Nation, Rode My Pony Across the Reservation!"*, 29 Tulsa L. J. 303 (1993); Amelia A. Fogleman, Note, *Sovereign Immunity and Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 Va. L. Rev. 1345 (1993);

The purpose of allowing tribes to organize corporate entities was so that the business entity could obtain credit and conduct business transactions, which was previously hindered by the tribe's immunity. See, e.g., State ex. rel. Oklahoma Tax Comm'n, 1992 OK 127 (1992) (citing Morris v. Watt, 640 F.2d 404, 409 n.11 (D.C. Cir. 1981)); Ogden v. Iowa Tribe of Kan. & Neb., 250 S.W.3d 822, 825-827 (Mo. Ct. App. 2008). By allowing tribes to create two separate entities, business transactions could be conducted by the section 17 corporation more easily without affecting the immunity of the tribe.

4. The case law and articles cited by the District Court do not support extension of the Nation's immunity to CNI.

The District Court cited three cases, two student notes and an article from an Idaho State Bar publication to support its conclusion that Section 17 corporations are entitled to immunity:

a. Atkinson v. Haldane.

The Court relied heavily on Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977). In recognizing that the purpose of the IRA would be hindered by immunity, the Atkinson court stated:

> Strict application of the immunity principle could severely retard the tribe's economic growth in a modern business world. Recognition of two legal entities, one with sovereign immunity, the other *with the possibility for waiver of that immunity* would enable the tribes to make maximum use of their property. The property of the corporation would be at risk, presumably in an amount necessary to satisfy those with whom the tribe deals in economic spheres. Yet some of the tribal property could be kept in reserve, safe from a judgment execution which could destroy the tribe's livelihood, in recognition of the special status of the Indian tribe.

One weakness of relying on this case is that the quoted passage is mere dicta. The Atkinson court did not make any holdings regarding the Section 17 corporation. Rather, the Atkinson court found that the acts alleged in the complaint were related

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Thomas P. McLish, Note, *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 Colum. L. Rev. 173, 178 (1988).

to the Section 16 "governmental" unit of the tribe – and not a Section 17 corporation. Atkinson at 175. Thus, the Section 17 corporation's immunity or possible waiver of immunity had no effect on the case. Because the Section 17 corporation did not commit any of the acts alleged in the complaint, the court's discussion of potential immunity cannot be understood as determining that all Section 17 corporations are automatically entitled to immunity.

Reliance upon the dicta set forth by the Supreme Court of Alaska in the Atkinson decision is even less persuasive given the Alaska Supreme Court's subsequent treatment of the decision. In Runyon v. Assoc. of Village Council Presidents, 84 P.3d 437 (Alaska 2004), in which the Alaska Supreme Court adopted the "real party in interest" test to determine if a tribal entity was entitled to the tribe's immunity, the court characterized the key provision of the Atkinson opinion as dicta. 84 P. 3d at 441.

Next, the Runyon court next explained that the "real party in interest" test was in accord with its historic recognition that a tribe can separate its assets and liabilities from those of a tribal corporation:

> We foresaw this arrangement over twenty-five years ago in our decision in Atkinson v. Haldane. There we suggested in dicta that a tribe might, for commercial purposes, wish to form a corporation exposed to suit in order to cultivate trust with business partners… the tribe's use of the corporate form protects their assets from being called upon to answer the corporation's debt. But this protection means that they are not the real party in interest… By severing [the tribe's] treasuries from the corporation, they have also cut off their sovereign immunity before it reaches [the corporation].

Runyon, 84 P.3d at 441 (internal citations omitted). The court stated that "protecting tribal assets has long been held crucial to the advancement of the federal polices advanced by immunity. The entity's financial relationship with the tribe is therefore of paramount importance." Runyon, 84 P.3d at 440. "[I]f a judgment against [an entity] will not reach the tribe's assets or if it lacks the 'power to bind or obligate the funds of the [tribe],' it is unlikely that the tribe is the real party in interest." The Runyon Court went on to find no immunity because the entity's liabilities were wholly its own, pursuant to a version of the

"real party in interest" test which will be discussed below. It is important to note that while the Honorable District Judge disregarded the Runyon decision because it did not involve a Section 17 corporation and because it did not explicitly abrogate the Atkinson decision (Order, Dkt. 21, at n. 9), the Runyon court itself said that this distinction did not matter:

> Although [Atkinson] considered tribal corporations formed under the Indian Reorganization Act, its insight is relevant here. The tribes' use of the corporate form protects their assets from being called upon to answer the corporation's debt. But this protection means that they are not the real party in interest. Though this case does not call upon us to decide what financial structure would endow an association like AVCP with the tribes' immunity, any arrangement forgoing a liability shield and exposing the tribal treasury would go a long way toward making the tribes the real parties in interest. The villages of the Yukon-Kuskokwim Delta have chosen to protect themselves from liability. By severing their treasuries from the corporation, they have also cut off their sovereign immunity before it reaches AVCP.
>
> 84 P. 3d at 441 (emphasis in original).[7]

It is critical to note that CNI's Charter does the same thing: Claims against CNI cannot reach the Nation's treasury. (Charter, Dkt. 54, at ¶ 1.03).

b. Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127, 1131 (D. Alaska 1978).

The Parker Drilling Court stated that a Section 17 corporation "has the ability to waive the protection of sovereign immunity," a proposition for which it cited the dicta in Atkinson. 451 F. Supp. at 1131. The Parker Drilling court offered no additional support or analysis beyond its citation to Atkinson as to why the Section 17 corporation was presumed entitled to immunity. As in the Atkinson case, the Parker Drilling court could not determine whether the acts precipitating the litigation were caused by the Section 16 or the Section 17 corporation. 415 F. Supp. at 1141. Thus, its presumption that the Section 17 corporation would be entitled to immunity is also mere dicta, and the opinion cited only Atkinson's dicta.

[7] There was another decision by the Supreme Court of Alaska which came after Atkinson, in which the court cited Atkinson multiple times but held that, "Section 17 corporations are amenable to suit and their assets are subject to execution." Hydaburg Coop. Ass'n v. Hydaburg Fisheries, 826 P.2d 751, 756-57 (Sup. Ct. Alaska. 1992).

c. Sanchez v. Santa Ana Golf Club, Inc.

The District Court also relied upon Sanchez v. Santa Ana Golf Club, Inc., 104 P.3d 548 (N.M. Ct. App. 2004) as entitling a Section 17 corporation to immunity despites the case's reliance on Parker Drilling. Also, Sanchez was decided ten months after Runyon, but Runyon is not referenced in Sanchez. The Sanchez decision states that "corporations formed under Section 17 enjoy sovereign immunity, but may waive such protection." Sanchez, 104 P.3d at 551 (citing Parker Drilling). As discussed above, Parker Drilling cannot properly be understood to support this proposition because its implicit assumption that a Section 17 corporation is entitled to immunity is not supported by any authority, other than the dicta in Atkinson. Parker Drilling, 451 F. Supp. at 1131.

d. Kenton Pettit, Note, The Waiver of Tribal Sovereign Immunity in the Contractual Context: Conflict Between the Ninth Circuit and the Alaska Supreme Court, 10 ALASKA L. REV. 363, 378-79 (1993).

The Pettit article, a law student's note, explains that Section 17 permits a tribe to form a corporate entity and claims that "assuming the Native group has sovereign status, then absent a sufficiently express and clear waiver, the corporate entity would be entitled to the protection of sovereign immunity." Pettit at 376. The only support the author provides for this conclusion once again is the dicta from the Atkinson decision.

e. David B. Jordan, Note, Federal Indian Law: Tribal Sovereign Immunity: Why Oklahoma Businesses Should Revamp Legal Relationships with Indian Tribes After Kiowa Tribe v. Manufacturing Technologies, Inc., 52 OKLA. L. REV. 489, 506 (1998).

The Jordan article, another student note, similarly concluded that Section 17 corporations could face liability if their charters contain "sue and be sued clauses", but he cited only the Pettit student note, which cited only Atkinson. 52 Okla. L. Rev. at 506.

f. Clay Smith, *Tribal Sovereign Immunity: A Primer*, 50 ADVOCATE 19, 20 (May 2007).

Clay Smith, who is affiliated with the Idaho Attorney General's Office Natural Resources Division, discussed waivers by way of a "sue and be sued" clause, but also acknowledged the "real party interest" test, citing Runyon, among other cases. Smith at 20-21, n.42.

Thus, the authorities cited by the Court do not offer solid support for presuming that 17 corporations are endowed with immunity—they just cite to each other, in a "round-robin" fashion, ultimately leading back to the dicta in Atkinson, the rationale for which was later rejected by the same court in Runyon. The court's rationale for distinguishing away Runyon was rejected by the Runyon court itself.

CNI cited another case as supporting a Section 17 corporation's entitlement to immunity. See Maryland Casualty Co. v. Citizens National Bank of West Hollywood, 361 F.2d 517 (5th Cir. 1966). In Maryland Casualty, the Fifth Circuit held that the Seminole Tribe was entitled to immunity, emphasizing protection of *the tribe's* assets, but overlooking that Section 17 says nothing about immunity; it presumed that the tribe and the corporation amounted to a single entity. Maryland Cas. Co., 361 F.2d at 520. Although the case notes that the Seminole tribe had been issued a charter of incorporation under Section 17, the case provides no suggestion that the corporation was operating separately from the tribe. Id. Thus, Maryland Casualty can be distinguished because the Section 17 corporation was apparently operating as an arm of the tribe and the tribe was the real party in interest. In contrast, CNI is not an arm of the Nation, and the Nation is not the real party in interest. Because MBF is not seeking to reach the assets of the Chickasaw Nation – only those of CNI – this case is unpersuasive.

MBF also had cited other cases on this point, but the District Court ruled that they did not apply. For example, the Court acknowledged that Gaines v. Ski Apache, 8 F.3d 726 (10th Cir. 1993) held that a Section 17 corporation "may be considered a citizen of the state of the principal place of business for diversity jurisdiction." However, the Court distinguished it on the basis that the Gaines court used the permissive may be a citizen instead of the mandatory will which was used when a tribal corporation is chartered under its own laws. According to the Court, this distinction was intentional because the case cited in support,

Enterprise Electric Co. v. Blackfeet Tribe of Indians, 353 F. Supp. 991 (D. Mont. 1973), held that a Section 17 corporation was deemed a citizen of Montana because it explicitly waived immunity through a "sue and be sued" clause. MBF respectfully submits that this is a distinction without a difference; MBF has always conceded that a broad "sue and be sued" clause is one way for there to be a waiver of immunity, but it is not the only way. The fact that there was a broad "sue and be sued" clause in that case does not mean that in the absence of such a clause, there would be immunity if the tribe were not the "real party in interest".

The court also acknowledged that American Vantage Cos., Inc., 292 F.3d at n. 1095 stated that "[a]n incorporated tribe, or an incorporated arm of a tribe, is, like any other corporation, ordinarily a citizen of the state in which it resides." However, the court distinguished this case because none of the cases cited by the American Vantage Cos., Inc. court involved section 17 corporations having an unlimited waiver of immunity in its Charter. As stated above, this was not a proper basis for distinguishing this case.

There is a better-reasoned line of cases, in that they do not circle back to dicta which was later disavowed; they apply the "real party in interest" or "arm of the tribe" test. For example, a Colorado appellate court recently applied this test. See State of Colorado, ex rel. Suthers v. Cash Advance and Preferred Cash Loans, ---P.3d ---, 2008 WL 1745824 (Colo. App. April 17, 2008) (because it was unknown whether the defendant tribal corporations were incorporated under tribal, state or federal law, the case was remanded for further discovery on the nature of the defendant tribal corporations to determine if two corporations formed by tribal nations were entitled to immunity based on an 11-factor test). As the Court explained, "the Supreme Court has yet to establish a test for determining when tribal immunity should be extended to tribal corporations. However, other courts have set forth different factors for determining when an organization is entitled to share in tribal immunity because it is so closely joined with, and dependent upon, a tribe as to be deemed an 'arm of the tribe.'" Id. at *12.

The court held that the following factors should be considered:

> (1) whether the corporations were organized under the tribes' laws or constitutions;
>
> (2) whether the purposes of the corporations are similar to the tribes' purposes;
>
> (3) whether the governing bodies of the corporations are composed predominantly of tribal officials;
>
> (4) whether the tribes have legal title to or own the property used by the corporations;
>
> (5) whether tribal officials exercise control over the corporation's administration and accounting;
>
> (6) whether the tribes' governing bodies have the authority to dismiss members of the governing bodies of the corporations;
>
> (7) whether the corporations generate their own revenues;
>
> (8) whether a suit against the corporations will affect the tribe's finances and bind or obligate tribal funds;
>
> (9) the announced purposes of the corporations;
>
> (10) whether the corporations manage or exploit tribal resources; and
>
> (11) whether protection of tribal assets and autonomy will be furthered by extending immunity to the corporations.

Id. at * 15.

The Alaska Supreme Court has similarly recognized that a non-profit corporation comprised of tribes was not entitled to tribal immunity because none of the tribes was a real party in interest. In Runyon v. Assoc. of Village Council Presidents, 84 P.3d 437, 440 (Alaska 2004), the Supreme Court of Alaska acknowledged its historic recognition that a tribe can separate its assets and liabilities from those of a tribal corporation, thereby separating the assets of the sovereign from those of the corporation, to support limiting immunity to the tribe:

> We foresaw this arrangement over twenty-five years ago in our decision in Atkinson v. Haldane. There we suggested in dicta that a tribe might, for commercial purposes, wish to form a corporation exposed to suit in order to cultivate trust with business partners… the tribe's use of the

> corporate form protects their assets from being called upon to answer the corporation's debt. But this protection means that they are not the real party in interest… By severing [the tribe's] treasuries from the corporation, they have also cut off their sovereign immunity before it reaches [the corporation].

Runyon, 84 P.3d at 441 (internal citations omitted). The court explained that "protecting tribal assets has long been held crucial to the advancement of the federal polices advanced by immunity. The entity's financial relationship with the tribe is therefore of paramount importance." Runyon, 84 P.3d at 440. "[I]f a judgment against [an entity] will not reach the tribe's assets or if it lacks the 'power to bind or obligate the funds of the [tribe],' it is unlikely that the tribe is the real party in interest." Id. at 441 (finding no immunity because the entity's liabilities were wholly its own). It is true as the District Court noted that Runyon did not involve a Section 17 corporation, but the Runyon court held that it did not matter. Id.

Other courts have applied the same test or slightly different versions of this test, with regard to corporations created under tribal or state law. See Cook v. Avi Casino Enterprises, Inc., 2008 WL 4890167 (9th Cir. Nov. 14, 2008). Dixon v. Picopa Construction Co., 160 Ariz. 251, 257 (1989); Ransom v. St. Regis Mohawk Education and Community Fund, Inc., 86 N.Y.2d 553 (N.Y. Ct. App. Oct. 24, 2995), Gavle v. Little Six Inc. 555 N.W. 2d 284, 294 (Minn. 1996), (applying the "real party interest" test in finding that immunity was proper); White Mountain Apache Tribe v. Smith Plumbing Co., *Inc.*, 856 F.2d 1301, 1305 (9th Cir. 1988) (holding that sovereign immunity did not bar an action against a tribe's surety because a judgment against the surety would not run against the tribe); McNally CPAs & Consultants v. DJ Hosts, No. 03-1159, 2004 Wis. App. LEXIS 960, *12 (Wisc. Ct. App. Nov. 24, 2004) (finding no immunity for a state-chartered corporation owned by a tribe). But cf. Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006) (commercial entity was entitled to immunity because it was "acting as an arm of the tribe so that its activities are properly deemed to be those of the tribe"). See also William C. Canby Jr., AMERICAN INDIAN LAW IN A NUT SHELL 94-95 (3d ed. 1998) ("If a tribally-chartered corporation operates independently of the tribal

government and does not engage in governmental functions, however, it may not qualify for immunity in the first place because it is not an arm of the tribe.").

The most important factor is whether the Nation has liability for CNI's liabilities. Runyon, 84 P.3d at 441 ("[T]ribes' use of the corporate form protects their assets from being called upon to answer the corporation's debt. But *this protection means that they are not the real party in interest*.")(emphasis added). MBF makes no claim upon the Nation, nor could it do so by virtue of the clause in the Charter which prohibits this.

Additionally, the governing officials of the Chickasaw Nation have recognized that CNI is a separate entity whose activities, transactions, obligations, liabilities and property are not those of the Chickasaw Nation. As the Chickasaw Supreme Court explained in previous litigation involving CNI:

> The Governor argues: The Articles of Incorporation approved by the Legislature and the Chickasaw people specifically provide in Article I, paragraph 1.03, that [CNI] is a distinct legal entity pursuant to 25 U.S.C. 503 and that its activities transactions, obligations, liabilities and property are not those of the Chickasaw Nation….The individual Legislators have essentially collectively agreed with the Governor and add: The framers of the Charter went to great lengths to ensure that the corporation is distinct from its incorporator, the Chickasaw Nation.

In re Scott, 5 Okla. Trib. 348, 1997 WL 1146307, *2 (Chickasaw Supreme Court Nov. 14, 1997).

CNI and the Nation do not have overlapping boards of directors or officers. It was formed under federal law. Tribal officials do not control it. It generates its own revenues. Protection of the Nation's assets or autonomy will not be furthered by extending its immunity to CNI, because this claim cannot reach the Nation's assets nor impinge on its authority. Thus, the overwhelming majority of the elements of the test, and the paramount one, whether a claim against CNI will reach the assets of the Nation, favor MBF's position. Therefore, because the Nation is not the real party in interest, the Nation's immunity does not protect CNI.

In addition, by ruling that diversity hinges on the corporation's immunity status, and stating that the Charter could waive it, the District Court would impermissibly allow a Section 17 corporation to "waive into" subject matter jurisdiction by waiving immunity. Subject matter jurisdiction is "the courts' statutory constitutional power to adjudicate the case." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998). "[P]arties can neither consent to federal jurisdiction nor waive a court's lack of jurisdiction." Thomas v. Miller, 489 F.3d 293, 298 (6th Cir. 2007)(citing Stock West Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221 (9th Cir. 1989)). "It is hornbook law that parties may not waive into or consent to subject matter jurisdiction which a federal court does not properly have by operation of [the] Constitution or Congress." Universal Consolidated Companies v. Bank of China, 35 F.3d 243, 247 (6th Cir. 1994). Thus, the District Court's intertwined determination of subject matter jurisdiction with immunity, and the ruling that there would be immunity unless CNI were to waive it, was reversible error.

5. There is Waiver Language in the Charter.

The Court held that CNI has automatic tribal immunity, which could have been waived in the Charter or the Agreement. (Order, Dkt. 21, at 17). The Court, citing Linneen v. Gila River Indian Community, 276 F. 3d 389 (9th Cir. 2002), held that as to the Charter, only a broad "sue and be sued" clause would suffice. (Order, Dkt. 21, at 18).

To do this, of course, the Court erroneously rejected the "real party in interest" test and also would allow CNI to "waive into" federal jurisdiction, as discussed above. The Court quoted a portion of the Charter, requiring a written resolution of CNI's Board approving levies on property and income of CNI's which were specifically pledged on a contract. (Order, pp. 17-18). But the Court overlooked another salient part of the Charter, which MBF has cited from the outset:

> CNI is a distinct legal entity pursuant to 25 U.S.C., Section 503 wholly-owned by the Chickasaw Nation and its corporate activities, transactions, obligations, liabilities and property are not those of the Chickasaw Nation.

This, of course, comports precisely with the "real party in interest" test set forth above. The assets of the sovereign, the Nation, never were at risk, and are not to this day. The fatal effect of this clause upon CNI's argument is demonstrated by CNI's utter failure, in four (4) briefs comprised many pages, even to mention this clause of its own Charter, even once. Thus, while it is true that the Charter does not contain the broadest possible "sue and be sued" clause, it does contain a clause which destroys any reasons for extending the Tribe's immunity to CNI.

6. Even if CNI possessed sovereign immunity, it was waived by the "clear and unmistakable" waiver contained in the Agreement.

Even assuming that CNI was entitled to sovereign immunity, and that it was not waived in the Charter, the waiver language of the Agreement contains a clear and unmistakable waiver of sovereign immunity that would be effective to waive the tribe's immunity. See Oklahoma Tax Comm'n v. Citizen Bend Potawatomi Tribe of Okla., 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 0002 (1991). Even an arbitration clause by itself could constitute a waiver of tribal immunity. See C&L Enter., Inc. v. Citizen Bank of Potawatomi Indian Tribe of Okla., 532 U.S. 411, 419, 121 S. Ct. 1589, 149 L. Ed. 2d 623, (2001).[8] Even CNI does not dispute that the language of the waiver would be effective to waive sovereign immunity.

The Court cited United States v. U.S. Fidelity & Guaranty Co., 309 U.S. 506, 657 (1940), on this point. While U.S. Fidelity does state that "immunity cannot be waived by [U.S. government] officials," this does not necessarily mean that a waiver cannot arise by virtue of the contract at issue here. The key is that there was a representation and warranty that the waiver had been obtained. In the other case cited by the court, World Touch Gaming, Inc. v. Massena Mgmt., LLC, 117 F. Supp. 2d 271 (N.D.N.Y. 2000), the agreement was with an unincorporated entity owned by a tribe, and there was no warranty that authority had been obtained.

[8] The District court mistakenly implied that MBF had not acknowledged this aspect of the C&L opinion; MBF recognizes that this opinion left open the question of whether an arbitration clause could constitute a waiver if unauthorized, and has acknowledged this throughout these proceedings. 532 U.S. at 523 N. 6; See Order, Dkt. 21, at 18-20. Plaintiff's Responses, Dkt. 8, at 20.

These cases do not stand for the proposition that a waiver executed by a President and CEO, who "represented and warranted" that he had obtained full authorization, cannot be valid. The language of the waiver itself was "clear and unequivocal;" no one argues to the contrary. After learning that the waiver by CNI would require approval by its Board, MBF sought and obtained a "representation and warranty" that this had been obtained—never imagining that CNI would later claim that it, through its President and CEO had defrauded MBF about this.

The Court acknowledged that "Although, given the actions of the parties surrounding the formation of the Contract, waiver might arise under an equitable doctrine, that is a separate inquiry". (Order at p. 22). The Court also acknowledged that the representation and warranty "makes this a closer case." (Order, p. 21). This issue should not have been disposed of on a Motion to Dismiss where no discovery has been conducted. Tennessee law, as selected by the parties in the contract, recognizes the doctrines of apparent authority and estoppel in proper circumstances. See, e.g., White v. Methodist Hospital, 844 S.W. 2d 642, 646 (Tenn. Ct. App. 192); Holbrook v. Lane, 1994 WL 287430 (Tenn. Ct. App. 1994).

X. CONCLUSION

For the reasons set forth hereinabove, MBF respectfully submits that this Court should reverse the District Court's ruling and reinstate this case.

XI. STATEMENT OF REASONS FOR ORAL ARGUMENT

This is a complex case with a number of difficult issues; MBF respectfully submits that it would be helpful to have counsel present oral argument to explain the most important points and answer any questions from the Court.

Respectfully submitted this 25th of February, 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the **BRIEF OF APPELLANT** filed through ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on February 25, 2009.

s/John R. Branson
John R. Branson

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMPHIS BIOFUELS LLC,	)	
	)	
Plaintiff,	)	Case No. 08-6145
	)	
v.	)	
	)	
CHICKASAW NATION INDUSTRIES, INC.	)	
	)	
Defendant.	)	

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,901 words, excluding the parts of the brief exempted by Red. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Office Word 2003 with no more than 10 ½ characters per inch in Courier type style.

Respectfully submitted this 25th of February, 2009,

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CHICKASAW NATION INDUSTRIES, INC.	)	
	)	
Defendant.	)	

APPENDIX

Docket Entry	Description	Date Filed
21	Order Granting Defendant's Motion to Dismiss	08/03/08
5-7	Charter of CNI	05/07/08
1	Verified Complaint of MBF	04/24/08
5-3	Draft of Internal Authorization and Contract for Conversion	08/13/08
5-3	Email from Neil Cohen to Ken Arnold, et al.	08/13/08
8-5	Declaration of Ken Arnold	06/05/08
5-3	Internal Authorization and Contract for Conversion	08/13/08
1-4	Complaint Filed in Chickasaw Nation Court	04/24/08
1-6	CNI's Reply Memorandum in Support of Motion to Dismiss	06/26/08

Respectfully submitted this 25th of February, 2009,

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